

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HEATHER HALEY,

Plaintiff,

v.

TALENTWISE, INC.,

Defendant.

CASE NO. C13-1915 MJP

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS

THIS MATTER comes before the Court on Defendant TalentWise, Inc.'s ("TalentWise") Motion to Dismiss Plaintiff Heather Haley's ("Haley") suit. The Court considered the complaint (Dkt. No. 22), the motion (Dkt. No. 24), the response (Dkt. No. 30), the reply (Dkt. No. 32), and all attached documents. The Court GRANTS IN PART and DENIES IN PART TalentWise's Motion to Dismiss. The Court dismisses Haley's negligence claims, but the remaining claims survive the Motion to Dismiss because they are facially plausible. Further, the Court will not determine class definitions on this Motion. The Court also DENIES Haley leave to file a second amended complaint.

Background

Haley brought suit against TalentWise, a consumer reporting agency, alleging it violated three provisions of 15 U.S.C. § 1681, the Fair Credit Reporting Act (“FCRA”), by reporting outdated and dismissed charges; reporting inaccurate, misleading, and internally inconsistent information; and failing to maintain strict procedures.

Haley began working for La Quinta Inns & Suites (“La Quinta”) in 2005. (Dkt. No. 22 at 6.) In early 2013, she was considered for promotion to assistant manager, and La Quinta obtained a consumer report on Haley from TalentWise. (*Id.*)

Haley alleges the consumer report La Quinta received from TalentWise was inaccurate and misleading, violating the FCRA. (Dkt. No. 22 at 7.) She claims TalentWise listed a dismissed robbery charge that was over seven years old. (*Id.*) She also maintains TalentWise listed her refusal to submit to a breathalyzer charge twice on the report but listed the charge as having two different dispositions (*Id.*); one part of the report shows the charge was dismissed, while another part shows the charge resulted in a conviction. (Dkt. No. 22-10 at 5-6.) Public records indicate the refusal to submit to a breathalyzer charge was dismissed. (Dkt. No. 25-1 at 12.)

La Quinta fired Haley after it received the consumer report, but she requested reinstatement. (Dkt. No. 22 at 7.) Haley alleges La Quinta sent her an e-mail stating it would not rehire her partly because La Quinta believed she was convicted of refusing to take a breathalyzer test. (*Id.*) Haley then requested TalentWise to send her a copy of the consumer report it had sent to La Quinta. (*Id.*) The report Haley received removed the dismissed robbery charge but did not alter either of the charges of refusing to submit to a breathalyzer. (*Id.* at 8.)

TalentWise moves to dismiss Haley’s First Amended Complaint, alleging Haley fails to state a claim upon which relief can be granted. TalentWise also moves to strike Haley’s class

1 definition. (Dkt. No. 24.) Haley asks the Court in her response for leave to file a second
 2 amended complaint to delete the negligence claims and amend the class definition at issue. (Dkt.
 3 No. 30.)

4 Analysis

5 **A. Legal Standard for a 12(b)(6) Motion**

6 To survive a Fed. R. Civ. P. 12(b)(6) motion, a complaint must state a claim for relief that
 7 is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim is facially
 8 plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable
 9 inference that the defendant is liable for the misconduct alleged.” Id. Plausibility does not mean
 10 probability, “but it asks for more than a sheer possibility that a defendant has acted unlawfully.”
 11 Id. Merely reciting the elements of a cause of action will not suffice. Bell Atl. Corp. v.
 12 Twombly, 550 U.S. 544, 555 (2007).

13 Courts follow a two-pronged approach when deciding whether a complaint survives a
 14 Fed. R. Civ. P. 12(b)(6) motion. Iqbal, 556 U.S. at 678-79. First, “a court must accept as true all
 15 of the allegations contained in a complaint” unless the allegations are legal conclusions. Id.
 16 Second, the claim for relief must be plausible, which is a context-specific task. Id. Courts can
 17 consider “documents attached to the complaint, documents incorporated by reference in the
 18 complaint, or matters of judicial notice” when making their determination. U.S. v. Ritchie, 342
 19 F.3d 903, 908 (9th Cir. 2003).

20 **B. A Violation of 15 U.S.C. § 1681c(a)(2) and (5) is Plausible as the Report Included a 21 Dismissed Charge From Over Seven Years Ago**

22 Consumer reporting agencies are prohibited from reporting certain information, including
 23 the following:
 24

Civil suits, civil judgments, and records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period [or]

Any other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.

15 U.S.C. § 1681c(a)(2) and (5) (emphasis supplied). Haley does more than recite the statute – she argues the report violated the FCRA because it included dismissed charges: “The consumer reports included dismissed charges antedating the report by more than seven years.” (Dkt. No. 22 at 17.) Haley also alleges that, after TalentWise became aware she either knew her rights under the FCRA or retained counsel, it sent her “a report with a backdated cover letter that deleted the outdated dismissed charges,” suggesting TalentWise knew the FCRA prohibited it from disclosing dismissed charges antedating the report by more than seven years. (*Id.* at 17-18.) Haley provided the Court with the consumer report showing the outdated dismissed charges. (Dkt. No. 22-10.)

“Records of arrest” and “adverse” information include dismissed charges. Haley correctly notes the “FCRA was the product of congressional concern over abuses in the credit reporting industry” and these “consumer oriented objectives support a liberal construction of the FCRA.” Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995). When construing a statute, the court is to “ascertain the intent of Congress in enacting it and give effect to legislative will.” U.S. v. Gilbert, 266 F.3d 1180, 1183 (9th Cir. 2001). The court does not look beyond the statute for interpretation if the plain language “renders its meaning reasonably clear.” *Id.* Based on Congress’s intent when drafting the statute and its plain language, the dismissed charge from over seven years ago is both a “record of arrest” and “adverse” information that TalentWise is prohibited from including in the consumer report.

TalentWise unsuccessfully argues the statute is ambiguous and it did not violate the FCRA based on its interpretation of the statute. TalentWise maintains federal law does not define the term “records of convictions,” so the law of Minnesota (where Haley was arrested) should govern. (Dkt. No. 24 at 9.) TalentWise contends the three counts of robbery arise out of the same incident, so, according to Minnesota law, all three charges are part of the same conviction record even though one charge was dismissed. (*Id.* at 10.) The argument fails for three reasons. First, TalentWise does not cite to case law showing Minnesota law is controlling authority. (*Id.* at 9-10.) Second, the cases do not discuss the FCRA – they discuss the expungement of criminal records. *See e.g., State v. A.V.G.*, No. A09-892, 2010 WL 935357, at *2 (Minn. Ct. App. March 16, 2010). Third, TalentWise’s interpretation of the statute works against the consumer, contradicting Congress’s intent. *See Guimond*, 45 F.3d at 1333.

Haley’s interpretation of the statute is more persuasive. Haley cites to *Serrano v. Sterling Testing Syst.*, 557 F. Supp. 2d 688, 693 (E.D. Penn. 2008), which held referencing an outdated arrest record constitutes “adverse information” under 15 U.S.C. § 1681c(a)(5). The court reasoned an outdated arrest record may have “an unfavorable bearing on a consumer’s eligibility or qualifications’ for employment.” *Id.* (internal citations omitted.) Although *Serrano* is non-controlling, it reflects the statute’s plain language and Congress’s intent: a record of arrest which includes a dismissed charge from over seven years ago is adverse information that consumer reporting agencies cannot disclose.

C. A Violation of 15 U.S.C. § 1681e(b) is Plausible as Parts of the Report Include Incorrect and Inconsistent Information

15 U.S.C. § 1681e(b) says when a consumer reporting agency creates a report, it is required to “follow reasonable procedures to assure maximum possible accuracy of the

1 information” regarding the individual who is the subject of the report. Haley alleges TalentWise
 2 violated § 1681e(b) in two instances:

3 Defendant reported dismissed charges as convictions, and did it in a way that it
 4 should have been able to prevent given that the inconsistency was apparent from
 the face of the report. Defendant also reported the same instance of conduct in
 multiple places in a single report.

5 (Dkt. No. 22 at 20.) One part of the report shows the charge of refusing to take a breathalyzer
 6 was dismissed, while another part shows the charge resulted in a conviction. (Dkt. No. 22-10 at
 7 5-6.) Haley alleges TalentWise could have easily detected the inconsistencies if it had taken the
 8 time to review the report before sending it out. (Dkt. No. 22 at 21.) The Court could reasonably
 9 infer from these allegations TalentWise did not follow reasonable procedures in order to assure
 10 maximum possible accuracy. Haley points to specific parts of the report that are incorrect,
 11 inconsistent, or misleading. (*Id.* at 20-21.)

12 TalentWise unsuccessfully contends the Court should dismiss this claim because
 13 § 1681e(b) does not create a cause of action any time a consumer reporting agency makes a
 14 mistake in preparing a report. (Dkt. No. 24 at 18.) TalentWise’s argument fails because it relies
 15 solely on non-precedential authority from outside the Ninth Circuit. *See e.g., Moore v. First*
 16 *Advantage Enter. Screening Corp.*, No. 4:12 CV-792, 2013 WL 1662959 (N.D. Ohio Apr. 17,
 17 2013).

18 Haley appropriately relies on Ninth Circuit authority, *Guimond*, 45 F.3d at 1333, which
 19 discusses § 1681e(b) and notes, the “reasonableness of the procedures and whether the agency
 20 followed them will be jury questions in the overwhelming majority of cases.” *Id.* Although
 21 *Guimond* discusses credit reports, it applies to this analysis because it shows the plaintiff is only
 22 required to plead the report was incorrect, which Haley did by pointing to specific inaccuracies.
 23 *See id.* At this point, the Court could infer from Haley’s allegations that TalentWise did not
 24

1 have reasonable procedures in place. Whether TalentWise actually did have reasonable
 2 procedures in place is likely a question for the jury (see id.), but in any event is unsuitable for a
 3 12(b)(6) motion to dismiss.

4 Haley also cites to non-controlling law, but the case she relies on provides insight on how
 5 a plaintiff should plead a § 1681e(b) violation. The court in Smith v. HireRight Solutions, Inc.,
 6 711 F. Supp. 2d 426, 436 (E.D. Penn. 2010) stated the language of § 1681e(b) is unambiguous,
 7 and it was “reasonable – and plausible – to infer that duplicative reporting of criminal cases on a
 8 single report creates an adverse presentation of [p]laintiff to a prospective employer.” Id. The
 9 court reasoned the misleading information suggested reasonable procedures were not put in place
 10 to assure the maximum possible accuracy of information. Id. at 433. Similarly, Haley’s
 11 allegation of the duplicative, but inconsistent, reporting of the refusal to submit to a breathalyzer
 12 charge plausibly suggests TalentWise did not have reasonable procedures in place to assure the
 13 information’s accuracy. (Dkt. No. 22 at 20-21.)

14 **D. A Violation of 15 U.S.C. § 1681k is Plausible as She was Not Notified of the Report**
 15 **and it was Not Up to Date**

16 15 U.S.C. § 1681k(a) describes the requirements a consumer reporting agency must
 17 follow when creating a consumer report for employment purposes:

18 (1) at the time such public record information is reported to the user of such
 19 consumer report, notify the consumer of the fact that public record information is
being reported by the consumer reporting agency, together with the name and
 address of the person to whom such information is being reported; or

20 (2) maintain strict procedures designed to insure that whenever public record
 21 information which is likely to have an adverse effect on a consumer's ability to
 22 obtain employment is reported it is complete and up to date. For purposes of this
 23 paragraph, items of public record relating to arrests [and] convictions [...] shall be
 24 considered up to date if the current public record status of the item at the time of
 the report is reported.

1 Id. (emphasis supplied.) Haley alleges TalentWise did not notify her it was sending a consumer
2 report to La Quinta, and she alleges the report shows she was convicted of a crime when the
3 charge was dismissed and shows that same charge had two different dispositions. (Dkt. No. 22
4 at 22.) A court could reasonably infer from these allegations TalentWise violated both parts of
5 the statute. Haley does not need to allege additional facts showing she did not receive
6 notification that TalentWise was sending La Quinta a consumer report because a court could
7 reasonably infer at this point she did not receive a report, especially since Defendant has not
8 argued otherwise.

9 The Smith case, although not governing law, applies to this case because it shows how a
10 court analyzes a motion to dismiss a § 1681k claim. See 711 F. Supp. at 426. The Smith court
11 states whether a defendant actually followed strict procedures is not appropriate to decide on a
12 motion to dismiss. Id. at 439. Similarly, this Court will not decide on a motion to dismiss
13 whether TalentWise in fact did maintain or actually follow strict procedures because that is a
14 question of fact. See id.

15 TalentWise argues the Court should dismiss Haley's First Amended Complaint because
16 she does not allege the DMV driving records section of the report is inconsistent with her DMV
17 public record. (Dkt. No. 24 at 23.) Haley did not make this allegation, but she does allege the
18 consumer report is inconsistent because it shows she had been "both convicted of a criminal
19 charge and had the same criminal charge dismissed." (Dkt. No. 22 at 22.) One of the records
20 TalentWise submitted with this Motion indicates the charge of refusing to submit to a
21 breathalyzer was dismissed (Dkt. No. 25-1 at 12), while the report itself shows she was convicted
22 of that same charge in one part but that it was dismissed in another. (Dkt. No. 22-10 at 5-6.)
23
24

1 The Court could infer from these allegations TalentWise failed to maintain strict procedures
 2 designed to insure its reports are complete and up to date. See § 1681k(a).

3 **E. A Willful Violation of the FCRA is Plausible Because She Suggests TalentWise Was**
 4 **Aware It Violated the FCRA**

5 15 U.S.C. § 1681n(a) allows recovery from “[a]ny person who willfully fails to comply
 6 with any requirement imposed under” the FCRA. A “willful” violation is one that was done
 7 knowingly or recklessly. Safeco Ins. Co. of America v. Burr, 551 U.S. 47, 57 (2007). The
 8 Supreme Court defined “reckless”:

9 A company subject to FCRA does not act in reckless disregard of it unless the
 10 action is not only a violation under a reasonable reading of the statute’s terms, but
 11 shows that the company ran a risk of violating the law substantially greater than
 12 the risk associated with a reading that was merely careless.

13 Id. at 70. The defendant’s action must have involved an unjustifiably high risk of harm that is
 14 either known or so obvious that it should have been known. Bateman v. Am. Multi-Cinema,
 15 Inc., 623 F.3d 708, 711 n.1 (9th Cir. 2010). A plaintiff is not required to show actual harm when
 16 suing for willful violations. Robins v. Spokeo, Inc., No. 11-56843, 2014 WL 407366, at *3 (9th
 17 Cir. Feb. 4, 2014).

18 Haley maintains TalentWise’s alleged violations were willful for several reasons,
 19 including that TalentWise “knew or had reason to know from the plentiful FCRA guidance on its
 20 own website that its conduct violates the FCRA” and that it “knew or had reason to know from
 21 its prior lawsuits and those of its parent company that its conduct violates the FCRA.” (Dkt. No.
 22 22 at 23.) Haley also alleges TalentWise removed the dismissed robbery charge from the
 23 consumer report it sent to her, suggesting TalentWise knew it could not legally disclose that
 24 charge. (Id. at 8.) The Court could reasonably infer from these allegations TalentWise violated
 the FCRA willfully.

F. Haley's Claims of Negligence are Not Plausible Because She Does Not Allege Damages

A claim for negligent noncompliance requires showing actual damages. See 15 U.S.C. § 1681o. The Court dismisses Haley's negligence claims because, although she alleges negligent violations of the FCRA, she does not allege damages as a result. (Dkt. No. 22.) Plaintiff herself moved to delete the claims. (Dkt. No. 30 at 24.)

G. The Court Resolves Class Definitions on a Rule 23 Motion

The Court will determine class certification when a party moves pursuant to Fed. R. Civ. P. 23. See McDonald v. General Mills, Inc., 387 F. Supp. 24, 38 (E.D. Cal. 1974). Whether the Court should strike Haley's class definition is not an appropriate issue to resolve on a motion to dismiss because "compliance with Rule 23 is not to be tested by a motion to dismiss for failure to state a claim." Gillibeau v. City of Richmond, 417 F.2d 426, 432 (9th Cir. 1969).

TalentWise argues unsuccessfully other courts have struck a plaintiff's class allegations on a motion to dismiss. See e.g., Brazil v. Dell, Inc., 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008). However, the Brazil court notes class actions are governed under Fed. R. Civ. P. 23, not under Fed. R. Civ. P. 12(b)(6). Id. at 1166. It also refused to consider "whether plaintiffs' claims can meet the commonality or typicality prongs of Rule 23, saving that inquiry" for later. Id. at 1167. The Court will not resolve class definitions on this Motion.

H. Filing a Second Amended Complaint Would be Futile Because the Court Dismisses Haley's Negligence Claims and Resolves Class Definitions at a Later Stage

Courts may deny a motion to amend a complaint if doing so would be futile. U.S. ex rel. Lee v. SmithKline Beecham, Inc., 245 F.3d 1048, 1502 (9th Cir. 2001). Haley asks the Court for leave to file a second amended complaint in order to refine the class definition at issue and remove the negligence claims. (Dkt. No. 30 at 24.) Granting leave to amend the complaint


1 would be futile as this Court dismisses the negligence claims and will decide class definitions at
2 a later time.

3 **Conclusion**

4 The Court GRANTS IN PART and DENIES IN PART TalentWise's Motion to Dismiss.
5 The Court dismisses Haley's negligence claims, but finds the remaining claims facially plausible.
6 Further, the Court will decide class definitions on a Fed. R. Civ. P. 23 motion. Therefore, the
7 Court DENIES Haley leave to file a second amended complaint.

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9 The clerk is ordered to provide copies of this order to all counsel.

10 Dated April 2, 2014.

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14 Marsha J. Pechman
United States District Judge